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MESSRS J TAN TEOH ASSOCIATES v. MSIG INSURANCE (MALAYSIA) BHD

COURT OF APPEAL, PUTRAJAYA
KAMALUDIN MD SAID JCA
SUPANG LIAN JCA
B MARIANA YAHYA JCA
[CIVIL APPEAL NO: S-02(NCVC)(W)-2201-11-2019]
2 DECEMBER 2022

C **Abstract** – *(i) The words used in an insurance policy must be given their plain and ordinary meaning in the context of the policy looked as a whole; (ii) The burden to prove that an insurance claim is false or fraudulent and falls within the exception of the insurance policy lies on the insurer.*

D ***INSURANCE:*** *Indemnity – Professional indemnity policy – Legal firm insured with insurer – Legal firm sued – Insurer rejected legal firm's request for indemnity – Interpretation of clauses of policy as a whole – Whether trial judge misinterpreted policy – Whether burden of proof on legal firm to prove dishonesty instead of on insurer – Whether trial judge failed to consider evidence tendered during trial*

E The appellant ('plaintiff') was a legal firm and was insured with the respondent ('defendant'), subject to all the terms and conditions under a professional indemnity policy ('policy'). The said policy's limit of liability was RM5 million for any one occurrence and/or any one period of insurance and the coverage period was from 10 January 2015 to 9 January 2016, F subject to a deductible of RM20,000 on each and every claim. The plaintiff was sued by one Kuan Ah Hock ('Kuan') for the sum of RM2 million ('Kuan suit') and judgment was entered in favour of Kuan, which was paid by the plaintiff ('Kuan judgment'). The plaintiff appealed to the Court of Appeal but the same was dismissed. The defendant rejected the plaintiff's request for G indemnity. Subsequently, the plaintiff filed a claim against the defendant in the High Court for, *inter alia*, the defendant to pay the sum of RM2,558,181.28 to the plaintiff after deduction of RM20,000. The High Court Judge ('HCJ') held that, on a balance of probabilities, the parties had not proven its case for breach of professional duty by reason of any negligent H act, error or omission and for dishonesty of employees. Hence, the present appeal. It was the plaintiff's case that the HCJ erred in: (i) his interpretation of the clauses of the policy as a whole; (ii) as a result, the HCJ erred in placing the burden of proof on the plaintiff to prove dishonesty instead of on the defendant; (iii) the HCJ failed to consider the evidence tendered during I the trial to determine the issue of whether the plaintiff had successfully discharged its burden of proof or otherwise; (iv) the HCJ had totally failed

to decide whether the defendant had indeed discharged its burden to prove 'dishonesty' under general exclusion (b) and to prove 'condonation' and 'participation' on the part of the plaintiff under the extension of 'dishonesty of employee' when he dismissed the plaintiff's claim.

Held (allowing appeal)
Per Kamaludin Md Said JCA delivering the judgment of the court:

(1) It was clearly stated in the policy that the indemnity was for breach of professional duty by reason of any negligent act, error or omission, whenever or wherever committed or alleged to have been committed. The words '… for breach of professional duty by reason of any negligent act, error or omission ...' had been interpreted erroneously by the HCJ in that the HCJ had held that the plaintiff needed to prove that the breach of the stakeholder duty was the result of 'negligent act and error and (instead of or) omission' instead of disjunctively. The HCJ had erred in interpreting the clauses in that: (i) he had misread and failed to apply his mind to the fact that the plaintiff's pleaded case was that it had acted properly hence was not deliberate because the breach was the result of an error; and (ii) he interpreted the clauses of the policy in that, after finding that the plaintiff's act in releasing the stakeholder was not a negligent act, the HCJ failed to proceed to consider whether the act was an error which was not deliberate. That was the plaintiff's pleaded case. (paras 44 & 45)

(2) The HCJ erred when he failed to interpret the phrase 'negligent act, error or omission' disjunctively in that when he held that the plaintiff's act of releasing the stakeholder money was not an act of 'negligence'. The HCJ should have considered and weighed the evidence tendered in this case and decide whether the breach of stakeholder duty by the plaintiff was deliberate or otherwise. The HCJ's failure to consider this clearly showed that he had failed to judicially appreciate the evidence tendered in this case. (paras 46 & 47)

(3) In the Kuan suit, the plaintiff was sued for 'breach of its stakeholder duties', which was a form of 'professional duty'. The policy provided clearly that the defendant agreed to indemnify the insured (the plaintiff) up to but not exceeding in the aggregate – the limit of liability stated in the Schedule for any claim for damages including the costs and expenses which may be made against them or any of them during the period specified in the Schedule for breach of professional duty by reason of any negligent act, error or omission, whenever or wherever committed or alleged to have been committed. (para 48)

(4) The HCJ in his grounds of decision, appeared to have started off on the right note when he held that the burden of proof rested on the insured to establish a right to recover under the terms of the policy. The burden

A then shifted to the defendant to prove the exclusion applied but only after the insured had established a covered loss. However, the HCJ failed to subsequently apply these basic principles to the case before him as could be seen by his subsequent reasonings in his grounds of judgment. There was merit in the plaintiff's appeal. This error of law
B therefore warranted this appellate court's intervention. (paras 56-58)

(5) The decision arrived at by the HCJ was without any basis, no reasoning and no justification based on the evidence produced as to why the plaintiff had failed to discharge the burden of proving its claim of error which was covered by the policy. The HCJ did not refer to any evidence
C in making his findings that the plaintiff had failed to discharge its burden of proof. The decision that was arrived at by the HCJ lacked judicial appreciation of evidence and was plainly wrong. (para 67)

Case(s) referred to:

Amanah Raya Bhd v. Jerneh Insurance Bhd [2005] 2 CLJ 393 CA ***(refd)***
D *Asean Security Paper Mills Sdn Bhd v. CGU Insurance Bhd [2007] 2 CLJ 1 FC* ***(refd)***
Barlow Clowes International Ltd (In Liquidation) And Others v. Eurotrust International Ltd And Others [2006] 1 WLR 1476 ***(refd)***
Chow Yee Wah & Anor v. Choo Ah Pat [1978] 1 LNS 32 PC ***(refd)***
CIMB Bank Bhd v. Sebang Gemilang Sdn Bhd & Anor [2018] 5 CLJ 129 FC ***(refd)***
E *Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC* ***(refd)***
Jardine Lloyd Thompson Sdn Bhd v. Berjaya Sompo Insurance Bhd [2014] 8 CLJ 265 CA ***(refd)***
Jasib Shipyard & Engineering (M) Sdn Bhd & Anor v. Tune Insurance Malaysia Bhd [2016] 1 LNS 1192 HC ***(refd)***
Kuan Pek Seng v. Robert Doran & Ors And Other Appeals [2012] 1 LNS 775 CA ***(refd)***
F *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC* ***(refd)***
Samuel Naik Siang Ting v. Public Bank Bhd [2015] 8 CLJ 944 FC ***(refd)***
Tan Liong Sin v. Etiqa Insurance Bhd [2016] 1 LNS 413 HC ***(refd)***
Ting Vui Tat & Anor v. Tokio Marine Insurance (Malaysia) Berhad & Anor [2019] 1 SSLR 59 ***(refd)***
G *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785 FC* ***(refd)***
Watt or Thomas v. Thomas [1947] AC 484 ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 11
Evidence Act 1950, s. 106

H *For the appellant - Joan Goh Penn Nee & Phang Fui Fong; M/s Goh & Assocs*
For the respondent - Govinda Raj; M/s Raj & Co

[Editor's note: Appeal from High Court, Kota Kinabalu; Writ of Summons No. BKI-22NCVC-135-12-2017 (overruled).]

I *Reported by Lina E*

JUDGMENT

Kamaludin Md Said JCA:

Introduction

[1] The appellant is a legal firm practicing under the name of J Tan Teoh Associates and had filed its appeal against the judgment of the learned High Court Judge at Kota Kinabalu, Sabah which had dismissed its claim against the respondent for indemnity under the professional indemnity insurance with costs of RM10,000 to the respondent.

[2] The appellant was the plaintiff in the court below while the respondent was the defendant. The parties shall be referred to as they were in the court below.

Brief Facts

[3] The plaintiff was insured with the defendant subject to all the terms and conditions under the Professional Indemnity Policy No. KG-09225439-PI (the said policy). The said policy's limit of liability is RM5,000,000 for any one occurrence and/or any one period of insurance. The coverage period for the said policy is from 10 January 2015 to 9 January 2016. The said policy is subject to a deductible of RM20,000 on each and every claim. There are also extension covered under the said policy including libel and slander, loss of documents and dishonesty of employee subject to the terms and conditions therein.

[4] Earlier on the plaintiff was sued by one Kuan Ah Hock (Kuan) in Suit No. BKI-22NCvC-115-10-2015 for the sum of RM2,000,000 ("Kuan suit"). After a full trial, judgment was on the 3 March 2017 entered in favour of the said Kuan which was paid by the plaintiff ("Kuan judgment"). The plaintiff appealed to the Court of Appeal and the same was dismissed on 6 March 2018.

[5] The defendant has *via* its letter dated 9 August 2017 to the plaintiff rejected the plaintiff's request for indemnity.

[6] Hence, the plaintiff filed a claim against the defendant for:

(i) the defendant to pay the sum of RM2,558,181.28 to the plaintiff after deduction of RM20,000;

(ii) interest on the sum RM2,558,181.28 at the rate of 5% per annum pursuant to s. 11 of the Civil Law Act 1956 or at such rate to be determined by the court from 18 December 2017 to the date of judgment;

(iii) interest at the rate of 5% per annum on the sum of RM2,558,181.28 from the date of judgment to the date of realisation;

(iv) or alternatively, general damages to be assessed;

A (v) interest at the rate of 5% per annum on the general damages as per item above from the date of judgment to the date of realisation;

(vi) costs;

(vii) any other relief as this court deems fit and proper.

B **[7]** The main issues for the consideration of the High Court were as follows:

(i) whether the plaintiff had committed a breach of professional duty by reason of "negligent act, error or omission"; and

C (ii) whether there had been a breach of professional duty on the part of the plaintiff due to dishonesty of its employee.

High Court's Findings

[8] The learned High Court Judge held that the burden rested on the D plaintiff and remained on them to prove on balance of probabilities that there was negligent act, error or omission and dishonesty. But where the insurer is relying on exclusion, or alleging fraud, the burden shifts to the insurer to prove the exclusion applies (but only after the insured has established a covered loss).

E **[9]** The learned High Court Judge held that on reading the Kuan judgment, there was no specific finding of any negligence against the plaintiff and its partners. This is because the Kuan suit was premised on the cause of action of a breach of stakeholder's duty and not in negligence. There was obviously no necessity for the court to make any reference as to whether there was any F negligence on the part of the plaintiff and its partners in releasing the stakeholder monies to the third party (Yong & Koh). The learned judge in the Kuan suit held in his judgment that it was unreasonable on the part of Mr Johnson Tan to refer to instructions from a third party as to the manner of the disposal of the stakeholder monies.

G **[10]** The learned High Court Judge also held that the fact that the Kuan judgment was totally silent about any negligence by the plaintiff and its partners must therefore mean that the plaintiff in the present case must prove that it had breached its professional duty by "a negligent act, error or omission" in order to trigger policy liability to claim the indemnity. The H plaintiff cannot rely on the Kuan judgment to allege that negligence had been proved when the same was totally silent in this regard.The plaintiff should have particularised the "negligent act, error or omission" but they had not only failed to plead any particulars of negligence but had also failed to adduce any evidence of negligence on its part. As the particulars and evidence of negligence are within the special knowledge of the plaintiff, it is for the I plaintiff to prove the alleged negligence pursuant to s. 106 of the Evidence Act 1950.

[11] Paragraph 22 of the plaintiff's statement of claim reads "the plaintiff only realised the error and omission after Kuan's solicitors requesting for the RM2,000,000 deposited to be refunded after the deal for the purchase of the shares of the company of Hallmark Essential was called off." The learned High Court Judge held that para. 22 showed the plaintiff's position which was that the release of the stakeholder monies was merely an "error or omission" and not due to any negligence on its part.

[12] A perusal of paras. 18, 19, 20 and 21 of the statement of claim also showed that the plaintiff's position was that it had acted properly in releasing the stakeholder monies of RM2,000,000 to the third party (Yong & Koh). The learned High Court Judge held that such position taken by the plaintiff would mean that the release of the RM2,000,000 was not a negligent act, error or omission.

[13] There was also evidence to support the defendant's contention that the stakeholder monies had been released to the third party (Yong & Koh) intentionally, wilfully and deliberately. The learned High Court Judge agreed with the defendant that the plaintiff had relied on the letter of instruction of the third party (Yong Chee Kong) dated 8 June 2015 and then had released the stakeholder monies to Yong & Koh (see paras. 18, 19, 20 & 21 of the statement of claim). The learned High Court Judge held that where release of the stakeholder monies to the third party was wilful, intentional, and deliberate, such act is not "a negligent act, error or omission". It is also trite law that an insurance policy which is intended to cover "negligence" will not cover an intentional act by the insured.

[14] Therefore, the learned High Court Judge held that the stakeholder monies had been released to the third party (Yong & Koh) intentionally, wilfully and deliberately. This wilful, intentional and deliberate release of the stakeholder monies to the third party was not "a negligent act, error or omission". The learned High Court Judge answered issue (i) in the negative.

[15] Further, the learned High Court Judge held that the relevant policy extension does not extend to any loss resulting from a claim against the insured arising from a dishonest, fraudulent, malicious or criminal act or omission of any principal, partner, director, officer or employee of the named insured and coverage under the extension shall not be provided to any insured committing, participating in or condoning such dishonest, fraudulent, malicious or criminal act or omission where such conduct is established by admission or court judgment or other adjudication.

[16] The evidence at the trial of this action showed that the plaintiff acting through Teoh See See (PW5) had participated in or had condoned the actions of Mr Johnson Tan (the employee) in releasing the stakeholder monies to the third party (Yong & Koh). The evidence showed that PW5 was the sole signatory for the cheques of the plaintiff and no payments by cheques could

be issued without her knowledge or consent. The fact that the plaintiff acting through PW5 had condoned or participated in the actions or omissions of Mr Johnson Tan cannot therefore be overlooked as PW5 was the sole signatory for the plaintiff's cheques. The condonation and participation by the plaintiff in the release of the stakeholder monies was the subject of the Kuan judgment.

[17] There was also no evidence adduced at the trial to show that Mr Johnson Tan had acted dishonestly in releasing the stakeholder monies to the third party. There were no pleadings setting out any particulars of any alleged dishonest acts or omissions by Mr Johnson Tan. The state of mind of Mr Johnson Tan (whether dishonest or otherwise) cannot be ascertained due to the lack of evidence in this regard. This means that the plaintiff has failed to prove an essential ingredient for the "dishonesty of employee" and cannot seek any relief under the extension for "dishonesty of employee" to claim for any loss suffered in view of the participation and/or condonation of the plaintiff with regard to the actions or omissions of Mr Johnson Tan. In the upshot, the learned High Court Judge answered issue (ii) in the negative.

[18] The general exclusion (b) of the policy also does not indemnify the insured against any claim brought about or contributed to by any dishonest, fraudulent, criminal or malicious act or omission of the insured or their predecessors in business, or of any person at any time employed by the Insured or such predecessors in business. The learned High Court Judge held that it was intimately related to the policy extension for "dishonesty of employee". The burden to prove general exclusion (b) of the policy rests on the defendant and could be overridden only if the plaintiff succeeded in proving its claim under the extension for "dishonesty of employee" including the proviso thereof. This means that the plaintiff must not only prove the dishonest acts or omissions of Mr Johnson Tan but must go further to show that the proviso to the extension was satisfied, namely the plaintiff did not participate or condone the dishonest acts or omissions of the employee, Mr Johnson Tan. Having considered the Kuan judgment, the court's decision there was that the plaintiff had breached its stakeholder's duty, as such the defendant had proven on a balance of probabilities. The plaintiff cannot deny the court finding of fact in the Kuan suit. The learned High Court Judge held that the plaintiff had failed to prove its entitlement under the "dishonesty of employee" extension.

[19] The learned High Court Judge held that on a balance of probabilities the plaintiff has not proven its case for breach of professional duty by reason of any negligent act, error or omission and for dishonesty of employees.

Grounds Of Appeal

[20] The plaintiff contended that the learned High Court Judge was plainly wrong in dismissing the plaintiff's case, in that there was "insufficient judicial appreciation of evidence". The learned High Court Judge had totally failed to refer and evaluate a single evidence tendered by the plaintiff.

[21] The plaintiff also contended that the learned High Court Judge had misread and misinterpreted the terms of the policy which resulted in an error of law and this has resulted in the learned High Court Judge having misdirected his mind on the issue of the burden of proof of the parties.

[22] In summary, it is the plaintiff's case in this appeal that the learned High Court Judge had erred in:

(i) his interpretation of the clauses of the policy as a whole;

(ii) as a result, the learned High Court Judge had erred in placing the burden of proof on the plaintiff to prove "dishonesty" instead of on the defendant;

(iii) the learned High Court Judge had failed to consider the evidence tendered during the trial to determine the issue of whether the plaintiff had successfully discharged its burden of proof or otherwise;

(iv) that the learned High Court Judge had totally failed to decide whether the defendant had indeed discharged its burden to prove "dishonesty" under general exclusion (b) and to prove "condonation" and "participation" on the part of the plaintiff under the extension of "dishonesty of employee" when he dismissed the plaintiff's claim.

Plaintiff's Submission

[23] In gist, the plaintiff is saying that on the construction of the policy particularly, cl. 1(i), general exclusion (b) and the extension of the policy (on dishonesty of employee), the learned High Court Judge should have considered that Kuan's claim against the plaintiff falls within the ambit of the policy which triggered the policy under cl. 1(i). This is because Kuan's claim against the plaintiff was for the plaintiff's breach of stakeholder duty as lawyers, hence, "stakeholder" duty is a "professional duty" of the plaintiff as a law firm. The claim made against the plaintiff by Kuan therefore had clearly triggered the policy under cl. 1(i).

[24] Since the plaintiff's claim here (based on Kuan's claim against the plaintiff) falls within the ambit of the policy under cl. 1(i), the learned High Court Judge should have considered whether the plaintiff or the late Johnson Tan was "dishonest", *ie*, whether general exclusion (b) as pleaded by the defendant applies. The burden is on the defendant (and not the plaintiff) to

prove that the plaintiff or the late Johnson Tan was "dishonest". If the learned High Court Judge finds that the late Johnson Tan was not "dishonest", then judgment must be entered against the defendant on the plaintiff's main claim of RM2,250,000 under cl. 1(i) with interests and costs.

[25] On the other hand, if the learned High Court Judge finds that the late Johnson Tan was "dishonest", general exclusion (b) applies which the plaintiff had paid extra premium for. Once the extension "dishonesty of employee" is triggered, the next issue to consider is whether the plaintiff or its partners have "participated" or "condoned" such dishonest act of the late Johnson Tan. Under the policy, this according to the plaintiff must be proved by way of "admission" or "court judgment" or "other adjudication".

[26] It was submitted that the plaintiff's claim against the defendant can only be dismissed in total if the defendant has successfully discharged its burden of proving that the plaintiff and the late Johnson Tan was dishonest, malicious or fraudulent. On the other hand, if only the late Johnson Tan was found to be dishonest, that the plaintiff has condoned or participated in the dishonest act of the late Johnson Tan, such participation or condonation can only be proven by way of admission or court judgment, or other adjudication made against the plaintiff.

[27] On the interpretation of the clauses in the policy, the plaintiff referred to the Court of Appeal case of *Jardine Lloyd Thompson Sdn Bhd v. Berjaya Sompo Insurance Bhd* [2014] 8 CLJ 265; [2014] 6 MLRA 199. In this case, the Court of Appeal had allowed the appellant's claim on appeal. The court in this case had to decide on the application of an extension clause in an insurance policy, and the court held as follows at pp. 282 to 284 (CLJ); pp. 210-211 (MLRA):

> [32] The net effect of the highlighted portions of the judgment of the Supreme Court of Tasmania is that the proviso only operates to preclude the insured from being indemnified by the insurer in cases where at the point of loss/misappropriation of any of the specified items listed in the proviso by an employee of the insured, the items either belonged to the insured or were in the custody of the insured. Our rationale for this construction of the proviso is that in cases where an employee of the insured misappropriates or loses one of the specified items listed in the proviso, then, the loss is that of the insured and not the client of the insured. In a fact situation of this nature, the insured cannot demand to be indemnified by the insurer because the optional extension clause only exists to indemnify the insured where the client of the insured has been defrauded by the fraudulent conduct of the employee when performing his duties on behalf of the insured and not to cases where the insured has been defrauded by his own employee. In other words, the emphasis should be on the nature of the claim of the client of the insured. *This must necessarily be so, in our opinion, because the optional extension clause only operates in respect of claims where the insurers are not liable in the first place under exclusion cl. 1(b).*

...

[34] ... *Accordingly, in our judgment, the only manner to reconcile the optional extension clause with exclusion cl. 1(b) of the insurance policy is to focus on the nature of the claim of the victim against the insured bearing in mind that exclusion cl. 1(b) makes it clear that, without the optional extension clause the insured would not be indemnified in respect of claims directly arising out of the fraudulent acts of employees, such as Razak.* (emphasis added)

[28] Based on the above decision, it was submitted that the learned High Court Judge in this case has failed to address this issue completely as shown in his grounds of judgment. Although the learned High Court Judge had identified two issues for trial as shown in para. [5] of his grounds of decision, however, he failed to appreciate the fact that Kuan's claim against the plaintiff is for breach of professional duty (*ie*, the plaintiff's professional duty as a lawyer to hold the stakeholder money), therefore, Kuan's claim against the plaintiff is in itself enough to trigger the policy under cl. 1(i).

[29] The plaintiff submitted that whether the breach was the result of an act that is "negligent, error or omission" (as covered by the policy) is to be decided based on the evidence tendered in this case before the learned High Court Judge and not in the Kuan's suit, hence, the learned High Court Judge should have considered Kuan's claim within the context of the claim itself which was a claim against the plaintiff for "breach of a professional duty" and not whether in the Kuan's judgment, there is any specific finding of any negligence against the plaintiffs and its partners or otherwise as shown in para. [17] of his grounds of decision.

[30] The plaintiff was sued for "breach of its stakeholder duties" which is a form of "professional duty". The learned High Court Judge instead focused on whether the plaintiff was negligent in the Kuan's suit. The learned High Court Judge had clearly erred for failing to find that Kuan's claim in itself had clearly triggered the policy. All the plaintiffs need to do during the trial of this case was to show that the breach of professional duty was not a deliberate act (hence is a negligent act, error or omission). It is not whether the learned judge in the Kuan's suit had made any findings of negligence against the plaintiff or otherwise. The learned High Court Judge had clearly misinterpreted and misconceived the real issues for trial in this case.

Defendant's Submission

[31] The defendant submitted that the refusal to indemnify the plaintiff for having released the stakeholder sum amounting to RM2,000,000 belonging to one Kuan Ah Hock ("Kuan") to a third party (Koh Chik Ping/Yong Chee Kong) without the consent of Kuan is correct because the plaintiff had acted on the instructions of one Yong Chee Kong in deliberate and wilful disregard of the rights of the owner of the stakeholder sum, Kuan.

[32] The plaintiff's claim for the indemnity was premised on two clauses in the policy, namely, breach of professional duty by reason of any negligent act, error or omission (pleaded at para. 32 of statement of claim). In other words, the plaintiff was relied on its own breach of professional duty by reason of "any negligent act, error or omission" to claim for the indemnity. The plaintiff also relied on policy extension of "dishonesty of employees" (pleaded at para. 8(a) of the reply to defence and para. 3(e) of surrejoinder). In other words, the plaintiff contended that the release of the stakeholder sum to the third party by Mr Johnson Tan (a solicitor, employee and consultant of the plaintiff) amounted to or was occasioned by the "dishonesty" of Mr Johnson Tan.

[33] The defendant submitted that the plaintiff bore the legal burden to prove that the "negligent, error or omission" in releasing the stakeholder sum of RM2,000,000 to the third party was due to negligence. The plaintiff had failed to plead any particulars of negligence in support of its purported breach of professional duty. The plaintiff also did not plead any particulars of the alleged "dishonest" acts or omissions by Mr Johnson Tan. The failure to plead these particulars are fatal to the plaintiff's claim.

See: *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 8 CLJ 944; [2015] 5 MLRA 665 (FC) at paras. 29 to 34 ("cases must be decided on the issues on the record").

[34] The defendant submitted that the plaintiff's contention that the burden of proof for both "negligence" and/or "dishonesty" rested on the defendant is clearly incorrect and is tantamount to a reversal of the burden of proof. The burden of proof rested on the plaintiff throughout the case and the plaintiff had failed to discharge the burden of proof with respect to "negligent act, error or omission" and/or dishonesty.

[35] The plaintiff must prove on a balance of probabilities that its claims for the indemnity would trigger liability under the policy. The claims must fall squarely within the terms of the insurance coverage in the policy. The failure by the plaintiff to discharge its burden of proof had resulted in their claims being dismissed. It is submitted that there was no appealable error by the learned judge in his judgment.

Analysis/Decision

[36] The present suit went through a full trial and witnesses gave their respective testimonies. The learned High Court Judge is expected to hear the evidence of witnesses, evaluate the evidence and made his findings. If the learned judge has done so, it is settled principle, stated and restated in domestic and wider common law jurisprudence, that an appellate court should not interfere with the trial judge's conclusions on primary facts unless

satisfied that he was plainly wrong (See: the Federal Court case of *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1, reaffirmed the position that, a decision that is arrived at, due to a lack of judicial appreciation of evidence is plainly wrong enunciated in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309 and *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785; *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] 1 LNS 32; *Watt or Thomas v. Thomas* [1947] AC 484). The Federal Court reminded the appellate judges that what is pertinent is that the "plainly wrong" test is not intended to be used by an appellate court as a means to substitute its own decision for that of the trial court on the facts. Where in arriving at the decision it could not reasonably be explained or justified and so was one which no reasonable judge could have reached. If the decision did not fall within any of the aforesaid categories, it is irrelevant, even if the appellate court thinks that with whatever degree of certainty, it considered that it would have reached a different conclusion from the trial judge.

[37] Following the principle laid down in *Ng Hoo Kui* (*supra)*, the outcome of the present appeal would therefore turn upon whether the findings of the learned trial judge were reasonably made or that the trial judge's conclusions on primary facts were plainly wrong which would allow this court to interfere with the decision.

[38] We have considered the oral and written submissions from the plaintiff and the defendant. In our view, the main issue in this appeal is whether the learned High Court Judge was correct in his decision that based on Kuan's suit which did not make any finding of negligent act of the plaintiff therefore, it is the duty of the plaintiff to prove negligent act in order to claim indemnity from the defendant under the terms of the policy.

[39] It is important to note that in the present case, the plaintiff pleaded that the defendant has breached the terms of the policy as it failed to indemnify the plaintiff for the claim made by Kuan Ah Hock. The plaintiff has been sued by one Kuan Ah Hock under the High Court Suit No. BKI-22NCvC-115-10-2015 for the sum of RM2,000,000 (Kuan suit). The defendant's failure to adhere to terms and conditions of the said policy had resulted the plaintiff to suffer losses and damages of RM2,558,181.28 (see: paras. 32 to 35 of the statement of claim).

[40] At para. 22 of the plaintiff's statement of claim, it was pleaded that the plaintiff only realised the error and omission after Kuan's solicitors requested for the RM2,000,000 deposit to be refunded after the deal for the purchase of the shares of the company of Hallmark Essential was called off. In fact, the learned High Court Judge had acknowledged that para. 22 is the plaintiff's position that the release of the stakeholder monies was merely an "error or omission" and not due to any negligence on its part.

[41] Be that as it may, the learned High Court Judge agreed with the defendant that the judgment in the Kuan suit was silent regarding any negligence by the plaintiff and its partners meant that the plaintiff must prove that it had breached its professional duty by reason of any "negligent act, error or omission" in order to trigger liability under the policy. The plaintiff cannot simply rely on the judgment in the Kuan suit to contend that their "negligent act, error or omission" had been proven when the judgment was silent in that regard.

[42] As alluded to earlier, the plaintiff's case before the learned High Court Judge in the Kuan suit is one of breach of stakeholder monies by error or omission and not based on negligence. The Kuan suit was premised on the cause of action for a breach of stakeholder's duties and not on the negligence of the plaintiff. It is not disputed that the plaintiff had relied on the judgment in the Kuan suit and that there were no findings of any negligence against the plaintiff and its partners in the Kuan suit. The court in Kuan suit held that the justification given by Mr Johnson Tan ("Johnson") (a solicitor in the employ of the plaintiff's firm) for releasing the stakeholder sum to Yong & Koh was untenable and in breach of the terms of the plaintiff's stakeholder obligation and the plaintiff was liable for the act of Johnson. It was unreasonable on the part of Johnson to refer to the instructions from a third party as to the manner of disposing the stakeholder sum. In other words, negligence is not the basis of the Kuan judgment but a finding of breach of stakeholder duties by the plaintiff. The plaintiff was the legal firm holding the stakeholder sum for Kuan in the share sale transaction.

[43] The relevant clauses in the policy for this case are as follows:

> 1. The Company (the defendant) hereby agrees to indemnify the Insured (the plaintiff) up to but not exceeding in the aggregate
>
> (a) The limit of liability stated in the Schedule for any claim for damages including the costs and expenses which may be made against them or any of them during the period specified in the Schedule.
>
> (i) For breach of professional duty by reason of any negligent act, error or omission, whenever or wherever committed or alleged to have been committed on or after the retroactive date specified in the Schedule of:
>
> (1) The Insured as defined in the Schedule.
>
> (2) The Predecessors in business of the Said firm in respect of whom insurance coverage in expressly provided in the Schedule.
>
> (3) Any person at any time employed by the Insured or such predecessors in business.

In the conduct, by or on behalf of the said firm or such predecessors, of any business conducted in their professional capacity, and

(ii) By reason of any negligent act, error or omission, whenever or wherever committed on or after the retroactive date specified in the Schedule, by any of the persons mentioned in (a), (b) and (c) above.

2. A claim series event as defined below shall be deemed to be one claim and the date of loss shall be the date when the first claim if the claims series event is made in writing against the insured.

(a) All claims for losses which are different Consequences or results of one negligent act, error or omission. It is deemed to be one negligent act, error or omission if more than one act omitted or committed was due to the same or similar cause or source provided the respective matters were legally or financially connected;

(b) More than one act omitted or committed resulting in the same loss; and/or

(c) One claim made against more than one liable person insured under one policy.

3. This policy shall only indemnify the Insured against liability in accordance with the laws of the countries stated in the Schedule and in respect of judgments, awards, payments or settlements made only within such countries as stated in the Schedule.

4. The Insured shall give written notice to the Company as soon as possible after becoming aware of circumstances which might reasonably be expected to produce a claim irrespective of the Insured's views as to the validity of the claim or on receiving information of a claim for which there may be liability under this policy. Any claim arising from such circumstances shall deem to have been made in the period of insurance in which such notice has been given.

5. Every letter, claim, writ, summons and process shall be forwarded to the Company immediately on receipt. No admission, offer, promise, payment or indemnity shall be made or given by or on behalf of the Insured without the written consent of the Company which shall be entitled to take over and conduct, in the name of the Insured, the defence or settlement of any claim or to prosecute in the name of the Insured for its own benefit any claim, and shall have full discretion in the conduct of any proceedings and in the settlement of any claim.

(b) General exclusion-The policy shall not indemnify the insured against any claim brought about or contributed to by any dishonest, fraudulent, criminal, or malicious act or omission of the insured or their predecessors in business, or of any person at any time employed by the insured or such predecessors in business.

(c) policy extensions are as follows:

(i) Extension 1 On libel and slander - RM1,500,000

(ii) Extension 2 On loss of documents - RM1,500,000.

(iii) Extension 3 On dishonesty of employee - RM1,500,000

(d) The lawyers covered by this policy are the partners of the firm, its legal consultant Tan Teck Seng and its legal assistant.

(e) The clause on the extension for dishonesty of employees states – "notwithstanding anything contained herein to the contrary, where an additional premium for this extension is specified in the schedule, it is hereby agreed that if during the period specified in the schedule, the insurer agreed to extend cover to any loss resulting form a claim against the criminal act or omission of any principal, partner, director, officer or employee of the named insured (other than sole practitioner) arising out of the conduct of the professional services, provided that coverage under the extension shall not be provided to any insured committing participating in or condoning such dishonest, fraudulent, malicious or criminal act or omission where such conduct is establish by admission or court judgment or other adjudication".

[44] It is clearly stated in the policy that the indemnity is for breach of professional duty by reason of any negligent act, error or omission, whenever or wherever committed or alleged to have been committed. Error or omission means the failure to execute required actions, or mistaken actions committed by a member and the liability arising out of a wrongful act by a member due to the negligent action or inaction, mistake, misstatement, error, neglect, inadvertence, or omission by a member in the discharge of duties on behalf of the agency. Error or omission is also defined to mean any actual or alleged error or misstatement or omission or neglect or breach of duty including misfeasance, malfeasance or nonfeasance by an "employee" in any capacity arising out of the "scope of duties". Error or omission also means any negligent act, error or omission while performing services under the Description of Services (See: https://www.lawinsider.com/dictionary/error-or-omission). The word, "error" is also generally defined in the dictionary as "mistake, condition of being wrong in opinion; amount of inaccuracy in calculation or measurement".

[45] The words, "for breach of professional duty by reason of any negligent act, error or omission ..." has been interpreted erroneously by the learned High Court Judge in that the learned High Court Judge had held that plaintiff needed to prove that the breach of the stakeholder duty was the result of "negligent act and error and (instead of or) omission" instead of disjunctively. This can be seen at para. [19] of his judgment when he found that the plaintiff's release of the stakeholder money was not due to negligence and in para. [20], he immediately concluded that because the plaintiff's

statement of claim showed that the plaintiff's position was that it had acted properly in releasing the money to the third party, the plaintiff therefore had not committed any negligent act, error or omission. The learned High Court Judge had erred in interpreting the clauses in that, firstly, he has misread and failed to apply his mind to the fact that the plaintiff's pleaded case is that it has acted properly hence was not deliberate because the breach was the result of an error. Secondly, the learned High Court Judge had erred in interpreting the clauses of the policy in that the learned High Court Judge after finding that the plaintiff's act in releasing the stakeholder money was not a negligent act, had failed to proceed to consider whether the act was an error, which was not deliberate. That was the plaintiff's pleaded case.

[46] The plaintiff cited the case of *Jasib Shipyard & Engineering (M) Sdn Bhd & Anor v. Tune Insurance Malaysia Bhd* [2016] 1 LNS 1192; [2016] 1 MLRHU 1587 which followed the case of *Amanah Raya Bhd v. Jerneh Insurance Bhd* [2005] 2 CLJ 393; [2005] 1 MLRA 177; [2005] 4 MLJ 1; [2005] 3 AMR 93 (a Court of Appeal case) which had held that the words used in an insurance policy must be given their plain, ordinary meaning in the context of the policy looked as a whole. In this case, the policy was clear in that a comma was used between the words "negligent act", "error" or "omission". In our considered view, the learned High Court Judge therefore erred when he failed to interpret the phrase "negligent act, error or omission" disjunctively in that when he held that the plaintiff's act of releasing the stakeholder money was not an act of "negligence", the learned High Court Judge should have proceeded to consider the plaintiff's pleaded case whether the plaintiff's act was one of error which was not deliberate.

[47] We agree with the plaintiff that even if the phrase "negligent act, error or omission" is to be read conjunctively, it only means that the breach of professional duty should not be one that is deliberate or intentional. The learned High Court Judge should have considered and weighed the evidence tendered in this case and decide whether the breach of stakeholder duty by the plaintiff was deliberate or otherwise. The learned High Court Judge's failure to consider this clearly showed that he had failed to judicially appreciate the evidence tendered in this case.

[48] The court in the Kuan suit held that the justification given by Mr Johnson Tan ("Johnson") (a solicitor in the employ of the plaintiff's firm) for releasing the stakeholder sum to Yong & Koh was untenable and in breach of the terms of the plaintiff's stakeholder obligation and the plaintiff was liable for the act of Johnson. Based on Kuan judgment, it is our view that the plaintiff claim is covered under the policy or trigger liability under the policy. In Kuan suit, the plaintiff was sued for "breach of its stakeholder duties" which is a form of "professional duty". The policy provides clearly that the company (the defendant) agrees to indemnify the insured (the plaintiff) up to but not exceeding in the aggregate-the limit of liability

stated in the Schedule for any claim for damages including the costs and expenses which may be made against them or any of them during the period specified in the Schedule for breach of professional duty by reason of any negligent act, error or omission, whenever or wherever committed or alleged to have been committed.

[49] We have read the grounds of judgment of the learned High Court Judge. The learned High Court Judge has set out two issues to be determined *ie*, whether the plaintiff had committed a breach of professional duty by reason of "negligent act, error or omission"; and whether there had been a breach of professional duty on the part of the plaintiff due to dishonesty of its employee. Although the learned High Court Judge was correct in determining the first issue however, we noted that the learned High Court Judge had instead focused on whether the plaintiff was negligent in the Kuan's suit. When Kuan suit made no finding on negligence, the learned High Judge took a stand the plaintiff's claim does not trigger liability under the policy. The learned judge in Kuan suit had also clearly held that the justification given by Mr Johnson Tan ("Johnson") (a solicitor in the employ of the plaintiff's firm) for releasing the stakeholder sum to Yong & Koh was untenable and in breach of the terms of the plaintiff's stakeholder obligation (wrongful act). In our view, the learned High Court Judge had clearly erred for failing to find that Kuan's claim in itself had clearly triggered the policy as we have stated above. We agree with the plaintiff that in the present case, what the plaintiff need to do during the trial was to show that the breach of professional duty was not a deliberate act (hence is a negligent act, error or omission). It is not whether the learned judge in the Kuan's suit had made any findings of negligence against the plaintiff or otherwise. The learned High Court Judge had clearly misinterpreted and misconceived the real issues for trial in this case.

[50] We also agree with the plaintiff's submission that whether the breach was the result of an act that is negligent, error or omission" (as covered by the policy) is to be decided based on the evidence tendered in the present case before the learned High Court Judge and not in the Kuan's suit, hence, the learned High Court Judge should have considered Kuan's claim within the context of the claim itself which was a claim against the plaintiff for "breach of a professional duty" and not whether in the Kuan's judgment, there is any specific finding of any negligence against the plaintiffs and its partners or otherwise as shown in para. [17] of his grounds of decision. We reproduced para. [17] of the judgment as follows:

> [17] On reading the Kuan judgment, there was no specific finding of any negligence against the plaintiff and its partners. This is not surprising because the Kuan suit was premised on the cause of action of a breach of stakeholder's duty and not in negligence. There was obviously no necessity for the court to make any reference as to whether there was any negligence on the part of the plaintiff and its partners in releasing the

stakeholder monies to the third party (Yong & Koh). The learned Judge in the Kuan suit had commented in para. 35 of his judgment that it was unreasonable on the part of Mr Johnson Tan to refer to instructions from a third party as to the manner of the disposal of the stakeholder monies.

[51] For clarity, in the Kuan suit, the learned judge (Ravinthran Paramaguru) had given judgment in favour of Kuan against the plaintiff and its partners. The judgment in the Kuan suit held *inter alia* that:

(i) the plaintiff's partner, Teoh See See had signed the plaintiff's cheque to release the stakeholder sum of RM2,000,000 to Yong Chee Kong and Koh Chik Ping. Teoh See See was the sole signatory of the firm's cheques;

(ii) the sum of RM2,000,000 which had been deposited with the plaintiff was clearly a stakeholder sum by virtue of the plaintiff's letter dated 10 June 2015 and the plaintiff's trust receipt;

(iii) the justification given by Mr Johnson Tan ("Johnson") (a solicitor in the employ of the plaintiff's firm) for releasing the stakeholder sum to Yong & Koh was untenable and in breach of the terms of the plaintiff's stakeholder obligation;

(iv) the trust receipt issued by the plaintiff was in the name of Kuan, and not to Yong or Koh. Therefore, the plaintiff had no authority to release the stakeholder sum to a third party without the express consent of Kuan or his solicitors;

(v) it was unreasonable on the part of Johnson to refer to the instructions from a third party as to the manner of disposing the stakeholder sum;

(vi) the plaintiff had wrongfully released the stakeholder sum to the third party, namely Yong and Koh. Although the plaintiff had filed a counterclaim against Yong who did not enter appearance to resist the counterclaim, the plaintiff did not apply to enter judgment in default against him;

(vii) it was not disputed that Johnson was registered as a lawyer in the plaintiff's firm and therefore, Johnson had the authority to give the undertaking on behalf of the plaintiff. The plaintiff was liable for the act of Johnson; and

(viii) that the judgment was entered for Kuan against the plaintiff and the plaintiff's partners.

[52] It is not disputed that in the Kuan suit, the plaintiff was found to have breached its professional duty as a stakeholder. The plaintiff has submitted that during the trial of this case, the plaintiff in discharging its burden has produced evidence to show that the breach of duty committed by the plaintiff was not a deliberate act in that it was an error. The defendant then raised its

defence by raising general exclusion (b) under the policy. Based on the position, in our view, it is trite law that in insurance cases, the burden to prove any exclusion under the policy lies with the insurer (the defendant). The burden to prove that the defendant is excluded from paying under the policy in this case lies with the defendant. In another words, the burden rests on the defendant to prove exclusion (b). This can be seen from the terms of the policy – exclusion (b) which says the policy shall not indemnify the insured against any claim brought about or contributed to by any dishonest, fraudulent, criminal or malicious act or omission of the insured or their predecessors in business, or of any person at any time employed by the insured or such predecessors in business. The burden is therefore on the defendant to prove that the plaintiff or its employee the late Johnson Tan in releasing the stakeholder money was "dishonest, fraudulent, criminal or malicious".

[53] In *Asean Security Paper Mills Sdn Bhd v. CGU Insurance Bhd* [2007] 2 CLJ 1; [2007] 1 MLRA 12 (Federal Court), the case cited by the plaintiff, it was held as follows at p. 19 (CLJ); p. 21 (MLRA):

> [11] The respondent charged that arson on instigation by Balasingham was the cause of the fire and thus it was incumbent for the respondent to prove circumstances which excluded any other explanation. In this case, however, the respondent had failed to do so. It must be noted that even the respondent's own witnesses (DW20, DW25 and DW34) admitted that "spontaneous combustion" could not be ruled out. *So, where the evidence leaves it open whether the loss was caused by accidental fire (spontaneous combustion) or arson, the appellant being the assured must recover since the presumption against crime operates in its favour.*
>
> ...
>
> On the question of onus of proof, the court quoting *Wedford and Otter-Harry's work* on *Fire Insurance*, 3rd edn, p 256 reasoned thus:
>
> > If the property is actually burned, the loss is in fact caused by fire and the policy therefore covers it unless the insurers succeed in establishing that the fire was originated by an excepted cause. Where the result of the evidence is to leave the cause of the fire in doubt, the insurers have not discharged the onus of proof and the assured therefore will succeed. Further, if the insurers rely on the defence of arson by or with the privity of the assured, the charge, being in effect a criminal charge, must be strictly proved. Hence, where the evidence leaves it open whether the loss was caused by accidental fire or by arson, the assured must recover since the presumption against crime operates in his favour.
> >
> > (emphasis added)

[54] In our considered view, the burden to prove that the claim is false or fraudulent and falls within an exception in the policy lies on the insurer. This has been made clear in several cases, in particular, the Federal Court decision

in *Asean Security Paper Mills*, above. It is for the defendant to prove, that the claim by the plaintiff was false or fraudulent in that the excepted cause (fire in this case) was in fact deliberately started by the plaintiff or any person acting on its behalf (see: *Tan Liong Sin v. Etiqa Insurance Bhd* [2016] 1 LNS 413; [2016] MLRHU 311 (HC) at paras. [17] and [18]).

[55] Similarly in *Ting Vui Tat & Anor v. Tokio Marine Insurance (Malaysia) Berhad & Anor* [2019] 1 SSLR 59, on burden of proof, the court held that:

> [47] By pleading that the premises were deliberately burnt down to facilitate the submission of a false and exaggerated claim, the 1st defendant has relied on the tort of fraud. Since, it is a defence raised to repudiate the claim, the burden to prove fraud lies on the insurer, *ie*, the 1st defendant. As for the standard of proof required to prove fraud, the Federal Court in the landmark case of *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 5 MLRA 191 settled the question by stating that is on the civil standard, *ie*, on the balance of probabilities.

[56] As far as the law is concerned, we noted that the learned High Court Judge in his grounds of decision appeared to have started off on the right note when he held that the burden of proof rests on the insured to establish a right to recover under the terms of the policy. The burden then shifts to the defendant to prove the exclusion applies, but only after the insured has established a covered loss. The judgment says this:

> [8] My view is this. It is fundamental insurance law that the burden of proof rests on the insured to establish a right to recover under the terms of the policy. In my view the burden rested on the plaintiff and remained on them to prove on the balance of probabilities that there was negligent act, error or omission and dishonesty. But not where the insurer is relying on exclusion, or alleging fraud, the burden shifts to the insurer to prove the exclusion applies (but only after the insured has established a covered loss). Now we consider the issues. We start with issue (i).

[57] However, the learned High Court Judge failed to subsequently apply these basic principles to the case before him as can be seen by his subsequent reasonings in his grounds of judgment. We reproduce here, the relevant finding as follows:

> [15] Thus the plaintiff submitted they did not or need not set out any specific particulars of negligence to support their breach of professional duty. The plaintiff's submissions showed that they are taking the position that the burden of proof to prove negligence rests with the defendant. *I am of the view that such submission is incorrect and misconceived because the plaintiff Is relying on the negligent act, error or omission to claim for the indemnity as such they must prove that their act error or omission* in releasing the RM2m stakeholder monies to the third party (Yong Chee Kong and Koh Chik Ping) was negligent.
>
> [18] The fact that the Kuan judgment was totally silent about any negligence by *the plaintiff and its partners and must therefore mean that the plaintiff in the present case must prove that it had breached its professional duty by*

> *"a negligent act, error or omission" in order to trigger policy liability to claim the indemnity*. The plaintiff cannot rely on the Kuan judgment to allege that negligence had been proved when the same was totally silent in this regard. The plaintiff should have particularised the negligent act, error or omission" but they had not only failed to plead any particulars of negligence but had also failed to adduce any evidence of negligence on its part. As the particulars and evidence of negligence are within the special knowledge of the plaintiff, *it is for the plaintiff to prove the alleged negligence pursuant to s. 106 of the Evidence Act 1950*.
>
> (emphasis added)

[58] We have established earlier that the breach of the terms of the plaintiff's stakeholder's duties is a breach of professional duty which is covered under the policy or trigger liability under the policy and the burden to prove that the claim is false or fraudulent falls within an exception in the policy lies on the insurer. By the decision of the learned High Court Judge above, we are of the considered view that on this point, there is merit in the plaintiff's appeal. This error of law therefore warrants this appellate court's intervention.

[59] The plaintiff's pleaded case here is that the facts in the Kuan suit proved that the plaintiff's breach of stakeholder's duty was the result of an error or omission, in that at the time Teoh See See (PW5), the sole signatory of the plaintiff's cheque signed the cheque, she had no knowledge whatsoever of the plaintiff's stakeholder duty. At all times, PW5 believed and had reasons to believe that the money was deposited for the account of Yong as his letter dated 8 June 2015 was able to identify the exact cheque number (which proved correct when the cheque image was retrieved during the trial) of the deposit and also the fact that there were no correspondences whatsoever from Kuan to suggest that the plaintiff has been engaged as stakeholder for Kuan. This proves that the act was not deliberate or intentional, hence is covered by the policy as it is a negligent act, error or omission. PW5's testimony is in fact supported by the testimony of Kuan's solicitor in the Kuan suit wherein he confirmed that at that time there was no written undertaking from the plaintiff to hold the money as stakeholder. Kuan solicitor also confirmed that he had at all times dealt with the late Johnson Tan personally. Therefore, the fact that the plaintiff had no knowledge (hence not wilful or intentional or deliberate) of its stakeholder duty is clearly supported by the evidence.

[60] PW5's relevant evidence during trial is shown below:

> Evidence of PW5. PW5 is the partner of the plaintiff who is the sole signatory of the plaintiff's account.
>
> At Q28, PW5 testified why she was not suspicious when releasing the money in accordance with the written instructions of Yong. PW5 testified as follows: "Ms. Teoh, can you tell the court why did it not arouse your suspicious when the 2 million was released to Yong Chee Kong and this is a stakeholder money?

> Firstly, there is no correspondences to suggest otherwise. Secondly, in my many years of practice, solicitors would write a letter to confirm the money is with them and indicate their client's intention for the transaction. At the same time they may also indicate the terms of their client's transaction. Further, they would also request our Client's agreement to the above before releasing the earnest money to us to hold as stakeholder.
>
> Was this done in this case?
>
> As far as I know this was not done in this case.
>
> (See p. 209 of encl. 3).

[61] The plaintiff submitted that at that time, PW5 had believed that the money was deposited for the account of Yong which subsequently turned out to be not the case. The plaintiff's act of releasing the money with the belief that it was deposited for the account of Yong was therefore an "error" and this error was not a deliberate act. The plaintiff's case is further supported based on the finding of facts made by the learned judge in the Kuan suit. In the Kuan suit, there was no findings made that the plaintiff had deliberately or dishonestly or maliciously or fraudulently released the sum in accordance with Yong's instructions. In fact, the evidence supports the fact that there were no correspondences between Kuan's solicitor and the plaintiff which would have put the plaintiff on notice of its stakeholder duty. All correspondences were sent to the personal email of the late Johnson Tan. There was also no confirmation in writing between Kuan's lawyer and the plaintiff prior to the said RM2,000,000 being deposited into the plaintiff's account. All these facts and evidence are undisputed and these evidence goes to prove that the plaintiff had not deliberately release the stakeholder money to Yong in breach of its stakeholder duty. The plaintiff's act therefore cannot amount to "dishonest", "fraudulent", "criminal", "malicious", "deliberate" or "wilful" as found by the learned High Court Judge.

[62] The test whether a person was consciously dishonest in providing assistance required him to have knowledge of the elements of the transaction which rendered his participation 'contrary to ordinary standards of honest behaviour', hence, to be "dishonest" one needs to have knowledge of the elements of the transaction. Therefore, the plaintiff here without knowledge of its stakeholder duty clearly cannot be said to have acted "dishonestly" (see: *Kuan Pek Seng v. Robert Doran & Ors And Other Appeals* [2012] 1 LNS 775; [2013] 2 MLJ 174, relying on the case of *Barlow Clowes International Ltd (In Liquidation) And Others v. Eurotrust International Ltd And Others* [2006] 1 WLR 1476).

[63] Therefore, based on the findings in the Kuan suit by the learned judge and the evidence produced during the trial in this case, it was the plaintiff's case that the plaintiff has duly discharged its burden of proof, in that the

plaintiff's act of releasing the money was an error (hence not deliberate) that amounted to a negligent act, error or omission. Such breach of professional (stakeholder) duty by the plaintiff is covered by the policy *ie*, the act was not deliberate but was an error. By that position, the burden now shifts to the defendant to proof that exclusion (b) under the policy applies *ie*, the plaintiff or its employee had breached its professional duty in releasing the money was due to an act that was "dishonest, fraudulent, criminal or malicious". The defendant had to prove that the plaintiff or the late Johnson Tan was either dishonest, fraudulent, criminal or malicious.

[64] We agree with the plaintiff that the learned High Court Judge had clearly failed to consider and assess the plaintiff's pleaded case which clearly pleaded the error committed by the plaintiff in the Kuan suit. We also agree that learned High Court Judge was only assessing whether the plaintiff was "negligent" in the Kuan suit which is misconceived. The issue of whether the plaintiff was negligent or otherwise should have been decided based on the evidence tendered during the trial of this case and not during the trial in Kuan's suit, because in the Kuan suit, the issue was whether the plaintiff has breached its professional duty as a stakeholder. Whether this breach of duty was negligent or not was immaterial in the Kuan suit.

[65] We further agree with the plaintiff that the learned High Court Judge was also in error in holding that the defendant's defence by raising general exclusion (b) "could be overridden only if the plaintiff succeeded in proving its claim under the extension for "dishonesty of employee" including the proviso thereof" (See para. [34] of the judgment). In our considered view, the learned High Court Judge had wrongly placed the burden to prove dishonesty of employee on the plaintiff even though it was actually the defendant's pleaded case. The learned High Court Judge appeared to think that the defendant's raising of general exclusion (b) is only relevant to the "dishonesty of employee" claim when in actual fact it was the defendant's main defence to the plaintiff's claim. We find the learned High Court Judge's error had therefore wrongly placed the burden of proof on the plaintiff which clearly is an error of law which justified an appellate court's intervention. The learned High Court Judge should have proceeded to consider whether the defendant has discharged its burden to prove that the plaintiff or its employee the late Johnson Tan was dishonest, fraudulent, criminal or malicious in accordance to exclusion (b) or otherwise. But this was never done.

[66] The plaintiff submitted that the learned High Court Judge in para. [21] found that the plaintiff's release of the money was done "intentionally, wilfully and deliberately". The learned High Court Judge appeared to have come to such finding without basis and without referring to any evidence at all. Again, in para. [24] the learned High Court Judge had found that the stakeholder money had been released to the third party "intentionally, wilfully and deliberately". The learned High Court Judge went on and found

that "this wilful, intentional and deliberate release of the stakeholder monies to the third party was not a negligent act, error or omission". What evidence did the learned High Court Judge rely on in coming to this conclusion? None whatsoever. The learned High Court Judge had clearly made such findings without considering any of the evidence tendered by the plaintiff. The learned High Court Judge also did not justify what were the evidence in this case that has led him to make such a finding against the plaintiff, that the plaintiff had acted intentionally, wilfully and deliberately in releasing the stakeholder money.

[67] Having read the learned High Court Judge's findings, we find that the decision arrived at is without any basis, no reasoning and no justification based on the evidence produced as to why the plaintiff had failed to discharge the burden of proving its claim of error which is covered by the policy. We agree that learned High Court Judge did not refer to any evidence in making his findings that the plaintiff has failed to discharge its burden of proof. The learned High Court Judge did not refer to the evidence tendered by the parties during the trial, particularly that of the plaintiff. In other words, a decision that is arrived at by the learned High Court Judge lacked judicial appreciation of evidence and is plainly wrong (*Gan Yook Chin & Anor v. Lee Ing Chin & Ors* (*supra*)). This is great injustice to the plaintiff.

[68] The plaintiff submitted that the learned High Court Judge appeared in para. [25] to find that the plaintiff had not pleaded its alternate claim of "dishonesty of employee" in its pleadings. The plaintiff's submitted that the issue of the plaintiff not pleading its alternative claim under the extension of the policy is misconceived. This is because the plaintiff has duly pleaded its alternative claim of "dishonesty of employee". On this issue, we find that since the issue was never raised during the trial, it cannot become an issue. Moreover, defendant's pleaded case is that the release of the stakeholder money was the result of the dishonest act of the late Johnson Tan. Be that as it may, as alluded to earlier, the learned judge had committed an error of law by placing the burden to prove dishonesty of the late Johnson Tan on the plaintiff's shoulders (See: para. [27] of the judgment). The burden is on the defendant to prove that the late Johnson Tan was "dishonest" pursuant to general exclusion (b), and if the defendant is successful in discharging its burden, then the next thing to prove is whether the plaintiff had "participated in or condoned" such dishonest, fraudulent malicious or criminal act of the late Johnson Tan.

[69] The other point raised by the plaintiff is that the learned High Court Judge never considered whether the defendant had discharged its burden of proof. The plaintiff submitted that the defendant's pleaded defence is that the defendant is not liable to pay under the policy because of general exclusion (b) *ie*, the plaintiff or its employee was "dishonest", "fraudulent", "criminal" or "malicious". However, the defendant failed to prove the defence save by

relying on the trust receipt dated 8 June 2015, the findings in the Kuan's suit (at para. [35]) that the late Johnson Tan was "unreasonable" to refer to instructions from a third party as to the manner of its disposal and its pleading that the plaintiff had released the money without the express consent of Kuan or his solicitor.

[70] The plaintiff has established earlier that PW5 had no knowledge whatsoever that Kuan had engaged the plaintiff as a stakeholder to hold the money. This does not amount to a "dishonest" act on the part of the late Johnson Tan or the plaintiff. The plaintiff submitted that there is no other evidence to show that the late Johnson Tan has the mental element to commit an act of dishonesty. We agree with the plaintiff that the learned High Court Judge did not evaluate the evidence before him save relying on the Kuan judgment. In *CIMB Bank Bhd v. Sebang Gemilang Sdn Bhd & Anor* [2018] 5 CLJ 129; [2018] 3 MLRA 83, the Federal Court held that, to establish "dishonesty" something more than knowledge is required to make the wrongful act dishonest. They require a "dishonest state of mind". The defendant has failed to discharge its burden of proof as pleaded in its defence, *ie*, general exclusion (b).

Conclusion

[71] Based on the above finding, we are satisfied that the learned High Court Judge was plainly wrong in dismissing the plaintiff's case. We find that there was "insufficient judicial appreciation of evidence". The learned High Court Judge had totally failed to refer and evaluate a single evidence tendered by the plaintiff. The learned High Court Judge had misread and misinterpreted the terms of the policy which resulted in an error of law and this has resulted in the learned High Court Judge having misdirected his mind on the issue of the burden of proof of the parties. As a result, the learned High Court has committed an error in his decision which required interference from this court to correct the decision.

[72] It is our unanimous decison that the plaintiff's appeal is allowed and judgment be entered against the defendant for the sum of RM2,250,000 as at 11 April 2018 with costs of RM20,000 subject to allocator. Interest at 5% p.a from 11 April 2018 until date of judgment and thereafter 5% p.a from date of judgment until realisation.